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No. 82-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

AMERICAN RADIO ASSOCIATION, MMP, AFL-CIO, and
RADIO OFFICERS UNION, NMEBA, AFL-CIO
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Irving Brownstein
Fagelson, Schonberger,
Payne & Arthur
401 Wythe Street
Alexandria, Virginia 22314
(703) 548-8100

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QUESTION PRESENTED

Whether the court below properly construed the authority of the Federal Communications Commission under Section 352 of the Communications Act, 47 U.S.C. §352, in affirming the Commission's grant of a general exemption from the radiotelegraph safety communications requirements of Title III, Part II, of the Communications Act, to U.S. cargo vessels of 1,600 gross tons or more on domestic voyages within 150 nautical miles of the coast of the contiguous 48 states.

PARTIES BELOW

American Radio Association, MMP, AFL-CIO, and Radio Officers Union, NMEBA, AFL-CIO, were the petitioning parties to the court below.

The Federal Communications Commission and the United States of America were respondents below.

The American Institute of Merchant Shipping was intervenor below.

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v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The American Radio Association, MMP, AFL-CIO ("ARA"), and the Radio Officers Union, NMEBA, AFL-CIO ("ROU"), petitioners in the court below, petition for a writ of certiorari to review the October 8, 1982, decision of the United States Court of Appeals for the Second Circuit in *American Radio Association, et al,* v. *Federal Communications Commission, et al.,* Case No. 82-4045. The court's decision affirmed the Report and Order of the Federal Communications Commission ("Commission" or "FCC"), released February 24, 1982, relating to the grant of a general exemption from the maritime radiotelegraph requirements of Title III, Part II, of the Communications Act, 47 U.S.C. §§351 *et seq.*.

OPINIONS AND ORDERS BELOW

The *per curiam* opinion of the United States Court of Appeals for the Second Circuit is reported at 690 F.2d 334, and is reprinted in Appendix A. The Commission's Report and Order, PR Docket 79-336, FCC 82-75, was published at 47 Fed. Reg. 10220 (March 10, 1982), and is set out in Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on October 8, 1982, and is reprinted in Appendix C. This Court's jurisdiction is invoked under 28 U.S.C. §§1254(1) and 2350.

STATUTES AND REGULATIONS INVOLVED

The statute upon which the Court of Appeals' decision is based is Title III, Part II, of the Communications Act, 47 U.S.C. §§351 *et seq.*, which is reproduced in full in Appendix D.

Regulations provided for compliance with the radiotelegraph requirements of Title III, Part II, of the Act are contained in Part 83, Subpart R, of the Commission's Rules, 47 C.F.R. §§83.441 *et seq.* and are reproduced in full in Appendix D.[1]

STATEMENT OF THE CASE

Title III, Part II, of the Communications Act, 47 U.S.C. §§351 *et seq.*, specifies the maritime radio distress and safety system for United States merchant vessels of 1600 gross tons or more. The system required to be employed by

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[1]References to the Appendix to this petition are hereafter given as "(App. _____)."

each vessel subject to the Act includes installation of specified radiotelegraph equipment, observation of certain watch requirements, and other procedures.[2] The system is modeled after the scheme adopted internationally by the International Convention for the Safety of Life at Sea ("SOLAS"). The underlying principle of the system is that all large ships in the open sea collectively constitute a pool of mutual assistance whereby distress aid or rescue may be readily obtained by alerting all nearby ships. The success of the system is dependent upon the compatibility of equipment and procedures employed by all vessels. That is, each vessel must listen on the same radio frequency,[3] and utilize the same mode of communication as other vessels. This uniformity is achieved domestically by the requirements of Title III, Part II, of the Communications Act, and by the SOLAS Convention as far as foreign vessels are concerned.

On February 11, 1982, the Federal Communications Commission, purporting to exercise its authority under Section 352(b) of the Communications Act, adopted an order (App. B-1) exempting domestic shipping from the

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[2]Section 351(a)(1)(A) of the Act requires a main radiotelegraph station on the large cargo ships under consideration herein; and details for its installation, reserve equipment, power, and operation are contained in 47 U.S.C. §354. Surivial craft radio is provided by 47 U.S.C. §355, and the Commission's Rules specify radiotelegraph equipment for survival craft radio stations, 47 C.F.R. §§83.469-83.473. Radiotelegraph distress frequency watch requirements are contained in 47 U.S.C. §353. Provision for direction finding equipment, to locate distressed vessels or survival craft by their radiotelegraph transmissions, is contained in 47 U.S.C. §§351(a)(2) and 354(i). Mandatory radio communication of maritime hazards to all ships in the vicinity is provided by 47 U.S.C. §357. Exemptions by statute, or by authority of the FCC, are described in 47 U.S.C. §352.

[3]500 kHz is the frequency designated internationally and domestically for radiotelegraph distress (S.O.S.) transmissions.

radiotelegraph requirements of the Act on the basis of substitute communications systems as outlined in an amended rule, 47 C.F.R. §83.480(c). On petition for review, ARA and ROU asserted, *inter alia*, that the Commission exceeded its exemption authority because the substitute equipment was not tested by the FCC for distress and safety purposes; it was not adequately detailed to permit a measured comparison with the known capabilities of radiotelegraphy; a communicatons gap would be created between exempt and non-exempt vessels; and no discussion was provided on the need for survival craft radio stations (47 U.S.C. §355) or the transmission of signals by exempt vessels for direction finding (see 47 U.S.C. §354(i)), among other provisions of Title III, Part II, which specify or rely upon the use of radiotelegraph equipment. The court below, holding that technological developments may provide a foundation for exemptions under 47 U.S.C. §352(b), affirmed the agency's grant of a general exemption from the cargo ship radiotelegraph station requirement of 47 U.S.C. §351(a)(1)(A) as a lawful exercise of discretion supported by substantial record evidence.[4]

1. Legislative and Regulatory Background

The history of Federal regulation of radio begins with the regulation of maritime radio.[5] In 1929, world standards for maritime distress communication were developed in the International Convention for the Safety of Life at Sea ("SOLAS"), May 31, 1929, 50 Stat. 1121, T.S. 910 (1929). Great loss of life in maritime disasters involving United

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[4]The basis for the jurisdiction of the United States Court of Appeals for the Second Circuit is Section 402(a) of the Communications Act of 1934, 47 U.S.C. §402(a), and Sections 2342 *et seq.* of the Federal Code of Judicial Procedure, 28 U.S.C. §§ 2342 *et seq.*.

[5]The early history of radio legislation, starting with the Wireless Ship Act of June 24, 1910, 36 Stat. 629, is summarized in *National Broadcasting Co. v. United States*, 319 U.S. 190, 210-211 (1943).

States vessels not subject to world standards,[6] and the ratification of the 1929 SOLAS treaty, led Congress, by amendment to the Communications Act, to adopt world radio standards for all U.S. cargo vessels operating on the high seas in the Act of May 20, 1937, 50 Stat. 192 ("1937 amendments").

As described by Congress, the purpose of the 1937 amendments to the Communications Act was "to promote safety of life and property at sea through the use of wire and radio communications and to make more effective the International Convention for the Safety of Life at Sea, 1929." H.R. Rep. No. 686, 75th Cong., 1st Sess. 2 (1937). The legislation adopted the technical details of SOLAS, "based on the principal of universal uniformity" *(Id.* at 4), in order to enhance the international pool of mutual assistance in maritime distress.[7]

In addition to provision for a basic radiotelegraph station and exemption authority modeled after world standards, Congress underscored the importance of survival craft radio and direction finding to maritime rescue operations:

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[6]In S. Rep. No. 196, 75th Cong., 1st Sess. 2 (1937), the Senate described one tragedy which may have been averted by uniform domestic and international maritime radio distress standards:

> "Today there are probably 600 or more ships of the United States of substantial tonnage carrying many persons as passengers and crews, which neither by our law nor the Convention are required to carry radio. No more pointed illustration of the danger and of the tragedy of this inadequacy of law can be found than in the fact that there was an American ship not required to be equipped with radio within 30 miles of the *Vestris* and which sailed away because it did not receive the SOS signals of the doomed vessel. We are told that that ship was so near to the Vestris that it might have saved all."

[7]The Senate Report similarly states: "The bill deals in detail with the technical requirements with respect to radio installation on board the ship. These technical requirements conform generally to those found in the International Convention on Safety of Life at Sea and to those required by the International Telecommunication Convention to which the United States is a party." S. Rep. No. 196, 75th Cong., 1st Sess. 3 (1937).

> The motorized lifeboat with radio equipment can act as a mother ship for all other lifeboats and can in the event of a disaster requiring the abandonment of ship continue SOS calls, can give the position of the lifeboats and can by transmitting allow the rescuing vessels to take bearing by radio direction finders, giving the position of the lifeboats.[8]

Periodic amendments to the SOLAS Convention have been consistently followed with conforming changes to legislative standards for U.S. vessels on domestic and international voyages. Treaty amendments in 1948[9] resulted in Communications Act amendments in 1954;[10] and SOLAS changes in 1960[11] were followed by complementary detail in 1965 maritime radio legislation.[12] These periodic legislative amendments, as explained by Congress, were intended "to give the convention full and complete effect."[13]

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[8]S. Rep. No. 196 at 4. *See also* S. Rep. No. 1583, 83rd Cong., 2d Sess. 16 (1954).

[9]International Convention for the Safety of Life at Sea, June 10, 1948, 16 U.S.T. 3450, T.I.A.S. 2495 (1948).

[10]Act of August 13, 1954, 68 Stat. 704. At this time Congress declined to expand the mileage limit restricting the FCC's exemption authority, but permitted retention of class exemptions in contrast to individual ship exemptions under SOLAS. Congress also declined to incorporate one legislative proposal unrelated to SOLAS in order to avoid confusion with amendments responsive to the safety convention. S. Rep. No. 1538, 83rd Cong., 2d Sess. (1954); H.R. Rep. No. 2285, 83rd Cong., 2d Sess. (1954).

[11]International Convention for the Safety of Life at Sea, June 17, 1960, 16 U.S.T. 185, T.I.A.S. 5780, 536 U.N.T.S. 27 (1960), amended by the International Convention for the Safety of Life at Sea, November 1, 1974, T.I.A.S. 9700 (1974).

[12]Act of August 13, 1965, Pub. L. No. 89-121, 79 Stat. 512; S. Rep. No. 526, 89th Cong., 1st Sess. (1965), *reprinted in* 1965 U.S. Code Cong. and Adm. News 2724; H.R. Rep. No. 380, 89th Cong. 1st Sess. (1965).

[13]S. Rep. No. 526 at 5-6.

Title III, Part II, of the Communications Act reflects a legislative judgment of policy that United States merchant and passenger vessels shall be able to seek and provide maritime distress assistance in the same manner as international ships subject to treaty requirements. Congress also specified the equipment, operations and procedures necessary to implement this purpose, but permitted the FCC to grant individual ship or class exemptions if the agency considered the statutory requirements to be "unreasonable or unnecessary" for the maritime safety purpose of Title III, Part II.

Part 83, Subpart R. of the Commission's Rules, 47 C.F.R. §83.441 *et seq.*, describe "Radio Telegraph and Ship Radar Stations Provided for Compliance with Part II of Title III of the Communications Act or the Radio Provisions of the Safety Convention" (App. D-14).[14] The Rules contain additional detail for the main radiotelegraph installation, reserve installations, auto alarms, direction finding equipment, ship radar installations, survival craft (lifeboat) radio equipment, spare parts, and testing, in conformance with the details of the Act and its treaty model.

2. The Proceedings Below

Referring to its exemption authority under §352(b) of the Communications Act, the FCC, on December 19, 1979, adopted a *Notice of Proposed Rulemaking and Notice of*

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[14]Subpart S of the Rules, 7 C.F.R. §§83.481 *et seq.* contains similar detail for radiotelephone stations, which smaller ships are authorized to employ in lieu of radiotelegraphy. *See* 47 U.S.C. §351 (A)(1)(B). Requirements for survival craft radio and direction finding equipment, however, only apply to larger ships not otherwise exempted from the radiotelegraph or direction finding requirements of the Act.

Inquiry ("NPRM/NOI"), published at 45 Fed. Reg. 1924 (January 9, 1980), proposing to exempt domestic merchant ships of 1,600 gross tons or more, on routes within 150 nautical miles from the coastline of the contiguous 48 states, from the uniform international and domestic requirements for use of Morse radiotelegraphy at a frequency of 500 kHz for maritime distress and safety communications (App. E-1). The proposal contemplated the use of radiotelephony, on the frequency 2182 kHz, as a substitute distress communications mode. In its *NPRM/NOI* (App. E-5), the FCC specifically inquired:

(1) Whether the Commission has the authority to grant a general exemption for cargo vessels weighing 1,600 gross tons or more, or whether Congress alone has such authority.
(2) What mileage restrictions from shore would be imposed if a general exemption is granted.
(3) The operational effectiveness of radiotelephony on 2182 kHz as compared with radiotelegraphy on 500 kHz in the geographical area of consideration.
(4) Whether a language barrier exists and, if so, whether it would inhibit the effective use of radiotelephony.

During the five-month period for comments and reply comments, which expired on May 30, 1980, extensive submissions were made to the FCC by Congressmen, government agencies, shipping interests, communication equipment providers, environmental concerns, maritime labor organizations, individual ship Radio Officers and others. These comments, summarized in an appendix to the agency Report and Order, were described by the FCC to reflect a "nearly unanimous" view that radiotelephony is not as effective as radiotelegraphy in the area under

consideration (App. B-10).

The Department of the Navy, noting treaty requirements for radiotelegraphy and the heavy traffic in shipping lanes in waters up to 150 nautical miles from the coast, opposed the proposed general exemption as placing "international shipping and U.S. Coastal shipping undue jeopardy" (App. E-25). The Coast Guard also opposed the proposal, noting the need to upgrade the qualifications of operators for substitute voice systems, the inadequacy of voice communication, and that the prospect for treaty amendments under a Future Global Maritime Distress and Safety System ("FGMDSS") to be implemented in the 1990's rendered the proposed action premature (App. E-11).

The Maritime Administration likewise opined that a domestic waiver of the radiotelegraph requirements could be premature or preemptive in view of the FGMDSS under consideration internationally; and that a "[r]egulatory abrogation of a longheld U.S. position" on the continuing importance of radiotelegraphy "could result in unfortunate consequences" (App. E-9).

On June 18, 1981, more than a year after the close of the comment period, Exxon Communications Company made an *ex parte* presentation to the FCC proposing individual ship exemptions from radiotelegraphy on the basis of an array of substitute systems. The proposals depended upon satellite communications equipment to provide coverage in the range of 70-150 nautical miles from shore. The Commission then solicited the views of the Coast Guard which, after proposing additions to the list of substitute equipment, concluded that: "Provision of this equipment along with a capability to operate and maintain all the vessel's systems used for distress and safety would be an

adequate substitute for the mandated radiotelegraph system" (App. E-28). The FCC thereafter ended its inquiry, deferring to the guidelines expressed by the Coast Guard as its final rule for a general exemption. In its rule, the Commission provided no technical refinement or detail to follow up on the Coast Guard guidelines and to permit objective measurement of equivalency of substitute systems with the detailed requirements and attributes of radiotelegraphy.

ARA and ROU repeatedly urged the Commission to conduct tests of alternative equipment under consideration, and detailed the experience of radio operators that satellite equipment—the critical component for communication between 70 and 150 nautical miles—was subject to failure in adverse conditions of sea and weather, in addition to other operational difficulties relating to the reliability and maintenance of newly developing satellite technology. (App. E-29). However, the FCC conducted no tests to provide empirical confirmation of its estimate that the "cumulative effect" of the alternative array of equipment "results in an adequate substitute for Morse telegraphy" (App. B-20). The Commission, further, did not discuss proposals for alternative distress communications equipment for survival craft,[15] and did not explain how an exempt vessel in distress could receive the intended distress and safety protection under the direction finding procedures of the Act when the equipment necessary to transmit signals for direction finding may be removed

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[15]Proposals for substitute radiotelephone equipment for survival craft on exempt ships were made by the American Institute of Merchant Shipping and Atlantic Richfield. Radio Officers reminded the FCC of the long-held U.S. position before the Inter-Governmental Maritime Consultive Organization ("IMCO") that continued use of radiotelegraphy is essential for survival craft rescue operations (App. E-19).

under the general exemption.[16]

The court below, upon concluding that the Commission has authority to grant general exemptions from the radiotelegraph requirements of Section 351 (a) (1) (A) of the Communications Act on the basis of technological developments, affirmed the agency's grant of a general exemption as a simple exercise of rulemaking discretion supported by substantial record evidence.

REASONS FOR GRANTING THE WRIT

This case presents important questions on the authority of the FCC to grant exemptions from the highly detailed radiotelegraph requirements under Title III, Part II, of the Communications Act, specified by Congress for the purpose of protecting human life at sea by use of uniform world standards for maritime safety and distress communications. The Commission, in a broadened view of its authority, held that it could grant a general exemption on the basis of substitute communications technology if the efficiency of distress services for ships is not diminished thereby; and it expressed a "belief" that the substitute systems listed as a condition for the exemption complied with this standard.

The court below, affirming the agency's conclusions as a simple exercise in discretion and fact finding, stated that (App. A-4):

> In particular, the Commission was justified in relying on the fact that the Navy's elimination of radiotelegraph equipment has had no effect on the

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[16]The FCC did not provide any exemption from the Section 351(a)(2) requirement that U.S. coastal vessels must carry direction finding equipment in order to lend assistance to other ships or survival craft in distress. Rather, the agency waiver of radiotegraphy transmission requirements excludes exempt vessels from seeking aid through conventional direction finding techniques, since the exempt vessels will no longer carry radio telegraph equipment necessary to providing a homing signal for other vessels seeking to lend assistance.

> safety of ocean-going vessels.[17] Moreover, there is evidence in the record that the federal agency most intimately involved in maritime safety, the United States Coast Guard, agreed with the Commission that the alternative systems "would be an adequate substitute for the mandated radiotelegraph system." Letter from M.E. Gilbert, U.S. Coast Guard, to James C. McKinney (October 1, 1981). With this evidentiary support the Commission's decision was neither arbitrary nor irrational. [footnote supplied]

The court, like the FCC, apparently did not perceive any duty under the Communications Act for the agency to address the life saving purpose of survival craft radio before exempting vessels from the only form of communication equipment required on lifeboats; to discuss the functions of conventional direction finding before authorizing removal of all equipment capable of transmitting signals for direction finding purposes; to provide technical details for substitute systems so that measurement might be taken against the known capabilities of radiotelegraphy; and finally, to take the necessary measurement by testing the substitute equipment under conditions likely to be encountered during maritime emergency or distress.

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[17]In its Report and Order the Commission stated that "there have been no reports of accidents to other ships or derogation of the radiotelegraphy pool of mutual assistance as a direct result of the removal of this 500 kHz capability from all naval vessels" (App. B-19). This conclusion of the Commission, which the court viewed with considerable deference, was a negative inference based on the lack of factual data from the Navy describing its experience. The only submission by the Navy to the FCC was its comments in opposition to a general exemption (App. E-25). Elsewhere in the Report and Order, the FCC noted concerns regarding a communications "gap" between U.S. merchant vessels and Navy vessels exempt from the radiotelegraph requirements of Title III, Part II, of the Communications Act (App. B-20, n.20). The agency acknowledged no inconsistency between this observation and its authorization for more vessels to be added to the far side of the gap.

By its silence on these factors, the court below has erroneously permitted the FCC to grant exemptions from statutory requirements under conditions of its own devising, rather than under the circumscribed authority of Section 352(b) of the Communications Act which permits exemptions only after an examination reveals that the purpose of the multiple requirements of Title III, Part II, is not undermined thereby.[18]

1. The silent affirmance by the court below of the Commission's failure to address the statutory life saving purpose of survival craft radio and transmissions for direction finding is in direct conflict with the long established maxim that agency decisions must reflect "reasoned consideration" of statutory factors in implementing the legislative objectives.[19] See *Industrial Union Department* v. *American Petroleum Institute,* 448 U.S. 607, 663 (1980) (Mr. Chief Justice Burger, concurring); *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 416 (1971); *Permian Basin Area Rate Cases,* 390 U.S. 747, 792 (1968).

The need to trace carefully the Congressional design for uniform and comprehensive maritime distress communication is underscored by regulatory details which were selected by Congress. Title III, Part II, in contrast to

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[18]The entire fleet of large U.S. cargo vessels and tankers on domestic routes in the subject waters — except nuclear ships for which there is no exemption authority — could qualify under the exemption upon installation of the substitute equipment. Although Congress has expressed faith in the Commission's ability to carry out the purpose of the Act (47 U.S.C. §361), the legislative history nowhere suggests that the exemption authority of the FCC may extend to an effective repeal of the statutory standards on the basis of a regulatory substitute.

[19]The court below erroneously perceived the Commission's action as limited to an exemption to Section 351(a)(1)(A) of the Act and confined its opinion accordingly. However, the general exemption extends broadly to all "radiotelegraph requirements of Title III, Part II" not just Section 351(a)(1)(A) (See 47 C.F.R. §83.480(c), App. D-43). Thus, exempt vessels may remove radiotelegraph installations from survival craft. In denying the petition for review, the court silently affirmed this result.

other parts of the Communications Act,[20] contains no broad quasi-legislative authority. Rather, as described by the Commission, "Congress clearly contemplated that United States cargo ships of 1,600 gross tons or more on coastwise (domestic) voyages would 'track' the radio communications standards...established by the Safety of Life at Sea Convention (SOLAS) for vessels on international voyages" (App. B-17). The agency's exemption authority does not extend to the selection of new standards or to deregulation under policies of its own choosing. Under Section 352(b) of the Act, the FCC may only permit ships to remove any of the mandated radiotelegraph equipment upon a finding that its continued maintenance is unreasonable or unnecessary for the purposes expressed by Congress.

Nowhere in its Report and Order did the Commission find that it was "unreasonable or unnecessary" for exempt vessels to maintain a radio station on survival craft, or conclude that such vessels would have no future need for locating and rescue by conventional direction finding techniques. Yet Congress has clearly specified that these capabilities are integral to the life saving "purpose" of Title III, Part II, which the Commission must consider as a threshold matter prior to granting exemptions. In *Industrial Union Department* v. *American Petroleum Institute,* 448 U.S. at 638-639, this Court found wanting a job safety rule where OSHA, similarly, failed to make a threshold "finding that any of the provisions of the new

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[20]The responsibilities entrusted to the Federal Communications Commission over common carriers and radio broadcast stations entail substantial discretion for the agency to determine what the public policy should be as well as the regulatory details for implementing the selected policies. Common carrier charges may be limited by "just and reasonable" rates established by the FCC (47 U.S.C. §205). The grant of a radio or television station license is subject to broad agency consideration of the "public convenience, interest or necessity" (47 U.S.C. §§307 and 309).

standard were 'reasonably necessary or appropriate to provide safe and healthful employment and places of employment' [29 U.S.C. §652(8)]. Nor did it allude to the possibility that any such finding may have been appropriate."

The error in the Commission's total failure to consider the possibility that exempt vessels, encountering the same maritime hazards as other ships, might need to rely on statutory provisions for survival craft radio or rescue by direction finding techniques is not surmounted by the oblique observation of the court below that substitute technology for the main radiotelegraph installation may provide a basis for exercise of the exemption authority.[21]

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[21] A Note by the Government of the United States of America to the Sub-Committee on Radiocommunications, Inter-Governmental Maritime Consultative Organization, "Operational Requirements for Portable and Fixed Radio Equipment for Survival Craft" (June 22, 1976), emphasizes the importance of survival craft radio and direction finding to the rescue of survivors (App. E-19):

> "Time is of the essence in sea rescues to minimize the duration of dangers to survivors posed by heavy seas and exposure to extremes of temperature. Therefore, accurate direction-finding is essential for timely rescue; it becomes even more crucial when the position of the survival craft is not known. Direction-finding on 500 kHz is less affected by ionospheric reflections (especially at night) and mutual interference from conductors with a length comparable to the radio wave length than is direction-finding on higher M/F [radiotelephone] frequencies.
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> * * * * *
>
> "An important consideration is the type of circumstances under which occur the greatest number of distress situations, i.e., in which men must take recourse to survival craft, and require facilities to summon assistance by radio: strong winds, heavy seas, and storm conditions are likely to prevail.
>
> Survivors must generally rely on the larger ocean-going cargo ships which are able to "live" in such seas and proceed to the location of the survival craft to effect rescue. In accordance with Chapter IV of the Safety Convention, these larger ships are fitted with communication facilities, auto alarms and direction-finders for 500 kHz, and carry radio officers, thus increasing the

2. The lower court also erred in viewing the Commission's choice as a simple matter of agency discretion, supported by record evidence, where the agency failed to provide technical details and to conduct tests by which the equivalency of substitute equipment could be empirically measured.

It has been observed that "one of the most difficult issues that could confront decisionmakers [is] whether the statistical possibility of future deaths should ever be disregarded in light of the economic costs of preventing those deaths." *Industrial Union Department* v. *American Petroleum Institute* at 672 (Mr. Justice Rehnquist, concurring). This, essentially, was the task which the Commission selected for itself in proposing a general exemption. However, unlike the statute involved in *Industrial Union,* Title III, Part II, of the Communications Act does not compell the FCC to make findings "on the frontiers of scientific knowledge" *(Id.* at 656), nor does it present a "difficult task to decode the message of the statute as to guidelines for administrative action" (*id.* at 663, Mr. Chief Justice Burger, concurring).

The details and capabilities of a minimum system for

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probability that they will receive survival craft radio transmission of the information most useful to facilitate rescue and enabling these ships to use direction-finding on 500 kHz to pinpoint the survival craft's position with accuracy.

* * * * *

"In total, approximately 1,000,000 lives are dependent on the 500 kHz safety system. Survival craft are vital constituents of the safety system that guards these lives. Survival craft radio equipment presently required, provide them with the direct and effective 500 kHz facilities common to the facilities fitted on the larger ships that are best able to assist, and indeed, may be the only ones able to assist them."

The Commission's disregard of the statutory purpose for survival craft radio is underscored by its failure to provide even the less desirable radiotelephone substitute proposed by some commenting parties as a condition to the grant of a general exemption from radiotelegraph requirements.

maritime radio safety communications have been established by Congress. The breadth of the FCC's exemption authority under the "other circumstances" language of Section 352(b) cannot be read to permit waiver of radiotelegraphy standards on a mere belief that alternative equipment may cumulatively permit adequate distress communication where no detail has been provided by which a measurement of the capabilities of the substitute systems may be taken, and no effort has been made to make an empirical measure against the known attributes of radiotelegraphy.[22]

The rule adopted by the FCC will permit vessel owners to select substitute equipment of greatly varying capabilities and with no specific guidance for details such as characterize the uniform system mandated by Congress. For example, the "single sideband radio telephone" component under the new rule, 47 C.F.R. §83.480 (c) (3), may be satisfied by a single-channel unit since there is now only one radiotelephone channel designated for distress by the FCC.[23] In addition to varying channel capabilities,

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[22]The Commission judged, in part, that the alternative array of equipment was consistent with developing plans for SOLAS amendments to provide for a Future Global Maritime Distress and Safety System (App. B-19). In the past, statutory amendments have consistently followed, not preceded, changes in treaty standards. The anticipatory action of the FCC is clouded by the unknown outcome of tests and details yet to be provided for the future system. See *In the Matter of the Inter-Governmental Maritime Consultative Organization: Provisional Recommendations and Amendments to the Safety of Life at Sea Convention, Notice of Inquiry*, P.R. Docket No. 82-594, FCC 82-395 (released August 27, 1982), 47 Fed. Reg. 40227 (September 13, 1982). World merchant ships will retain radiotelegraph capability until the future system has been developed, tested, and is fully operational, which is not expected to take place until the 1990's.

[23]2182 kHz is the only high frequency (radiotelephone) channel designated for distress and safety. The FCC denied recommendations to add two additional frequencies for this purpose, determining it inadvisable to do so prior to the 1983 World Administrative Radio Conference (App. B-21, n.21).

exempt vessels may select equipment operating at 15 watts to 500 watts, which is the authorized range for power under other FCC rules (47 C.F.R. §83.134). The requirement for "two VHF transceivers" may likewise result in non-uniform equipment of varying capabilities on exempt vessels. Under existing FCC rules, the choice may range from single-channel, two-watt handheld units to multichannel 25-watt installed equipment *(id.)*[24] If the Commission's "belief" regarding the capabilities of the substitute equipment was predicated on exempt vessel owners selecting the greatest capacity (and most expensive) equipment, it did not say so.

The lack of technical detail for the substitute equipment on exempted vessels — particularly the satellite component — may be contrasted with specific radiotelegraph requirements. Emergency power for radiotelegraph installations must be capable of operating for at least six continuous hours, 47 U.S.C. §354 (a), (f), and 47 C.F.R. §83.446 (a) (8); no minimum capacity or duration is prescribed for emergency power under the substitute systems. The Act and Regulations provide specifics on the location of the radiotelegraph station and prescribe protection from extremes of temperature and other elements; similar caution is neglected under the general exemption, although the FCC was advised that satellite equipment is sensitive to changes and extremes of temperature. The Commission's Rules contain detail on the provision and location of spare parts for radiotelegraphy equipment, 47 C.F.R. §§83.474-83.479; exempt vessels are only guided by the simple instruction that they shall have the capability to maintain substitute safety

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[24]Greater detail is provided in Supbart BB of the Commission's Rules for VHF stations on ships governed by SOLAS standards (47 C.F.R. §§83.851 *et seq.*). But, as the FFC and the court below have carefully emphasized, the vessels eligible for the general exemption are not subject to SOLAS.

communications systems.[25]

The failure of the Commission to conduct tests further underscores the shaky foundation undergirding the Commission's "belief" that the substitute array will provide adequate distress communication services.

ARA and ROU, whose members operate all shipboard communications equipment discussed by the FCC, repeatedly urged the Commission to conduct tests of any substitute for radiotelegraphy under the demanding and hazardous conditions generally encountered during maritime distress. The Commission was advised of the actual experience of Radio Officers showing that satellite technology—upon which exempt ships are dependent for long range communication—has not yet developed to the point of being reliable for maritime safety and distress purposes (App. E-32).[26] The Commission did not acknowledge this data. And instead of providing an explanation of how the substitute array — each component of which was admitted to have "unique limitations" — would operate together to fulfill the expectation of

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[25]Some individual components in the substitute array may be subject to greater detail than is apparent by the new rule if the Commission intended, without saying so, to apply other rules to exempt ships. See 47 C.F.R. §§83.481 *et seq.* (radiotelephone stations) and §§83.449-83-457 (radiotelegraph auto alarms). However, no comparable detail is provided explicitly or implicitly for satellite systems (Subpart AA, *id.*, §§83.840-83.843), or for narrow-band direct printing radiotelegraph with SITOR (*id.*, §83.143).

[26]Data gathered by Radio Officers, when it became apparent that the FCC was concluding its inquiry without conducting tests, revealed shipboard staellite communication outages extending for days and weeks at a time. Among the most frequently encountered causes for malfunctions were: changes or extremes or temperature; the roll and pitch of the vessel in high seas; satellite antenna shading from the ship's superstructure; and various equipment defects. Further, replacement parts for expensive satellite equipment are not generally carried on board the vessel. Therefore, it was frequently necessary to tolerate an outage for sustained period an open sea until repairs could be effected at a port of call.

cumulative adequacy, the Commission merely expressed its faith that the expectation would be realized (App. B-20).

The untested "belief" of the FCC does not present the factual analysis of identified scientific data by an agency to which courts may properly defer. See *Federal Power Commission* v. *Florida Power and Light Company*, 404 U.S. 453 (1972); *Industrial Union Department* v. *American Petroleum Institute*, 448 U.S. at 1043-44. The court below erred in accepting the FCC's untested belief alone as an adequate basis for a general exemption from the detailed and time-tested radiotelegraph system.[27]

The Commission's decision in this instance may be likened to the action criticized in *Electronics Industries Association Consumer Electronics Group* v. *FCC*, 204 U.S. App. D.C. 417, 636 F.2d 689, 698 (1980), where the court observed that: "[t]he Commission's faith in technological improvement is no substitute for present engineering capabilities." While in *Electronics Industries* the FCC forthrightly admitted that it relied on the development of new technology to catch up to its rule, the agency's belief in present engineering capability in this case is equally elusive in the absence of any effort to conduct tests of the equipment to demonstrate its effectiveness for safety and distress communication purposes.[28]

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[27]The court countenanced the FCC's action as justified by reliance on the opinion of the Coast Guard. No doubt the Coast Guard, like the FCC, possesses a measure of expertise in the area of maritime distress communication. However, the Coast Guard is not charged with implementing the Communications Act or authorizing exemptions thereunder. The need for objective tests to measure the substitute equipment against the capabilities of the detailed radiotelegraph system selected by Congress cannot rationally be avoided by the FCC's deference to the opinion of a sister agency which itself conducted no identified tests and was under no obligation to do so.

[28]The Report and Order reveals that the Commission's faith was anticipatory to a significant degree. There was no satellite coverage whatsoever for ships in portions of the Gulf of Mexico during the period of time studied by the Commission as a basis for its rules (App. B-12). The FCC allowed its decision to become final without confirmation that a satellite, scheduled to become operational in February 1982, was actually functioning and serving this area as anticipated.

The risk to human life under an alternative array of equipment which has not been tested for reliability for maritime distress communication, and which is not capable of measurement due to a lack of detail, militates strongly in favor of granting the writ to review the decision below.

CONCLUSION

The determination of the Court of Appeals that the FCC complied with the authority and purpose of Title III, Part II, of the Communications Act, where no discussion or provision is made for survival craft radio or transmissions necessary for direction finding on merchant vessels exempted from the radiotelegraph provisions of the Act, and where the equipment substituted for the main radio installation has not been detailed nor tested for maritime distress purposes, presents serious legal questions of first impresson which warrant plenary review by this Court. The unmeasurable risk to human life at sea by the failure of the agency and court below to address factors of express Congressional concern emphasizes the importance of this case. Accordingly, the American Radio Association and Radio Officers Union urge the Court to grant the requested writ of certiorari.

Respectfully submitted,

Irving Brownstein
Fagelson, Schonberger
Payne & Arthur
401 Wythe Street
Alexandria, Virginia 22300
(703) 548-8100

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